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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 787

L. McLEOD, *Petitioner,*

v.

M. C. THRELKELD, ET AL.,
DOING BUSINESS AS
THRELKELD COMMISSARY COMPANY, A PARTNERSHIP,
Respondents

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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LIST OF AUTHORITIES

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Opinions Below

The opinion of the District Court (R. 17-22) is reported in 46 F. Supp. 208. The opinion of the Circuit Court of Appeals (R. 31-34) is reported in 131 F. (2d) 880.

Jurisdiction

The judgment of the Circuit Court of Appeals was en-

tered on December 9, 1942 (R. 35). The petition for a writ of certiorari was docketed on March 4, 1943. The jurisdiction of the Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended.

Questions Presented

1. Whether a cook, employed by respondent, preparing and serving meals to some, but not all, of a gang of maintenance-of-way employees of an interstate railroad is engaged "in commerce" within the meaning of the Fair Labor Standards Act.

2. Whether such a cook is employed in a "service establishment" within the meaning of Section 13(a)(2) of the Fair Labor Standards Act.

Statement

Respondent is a partnership engaged in the business of providing meals for certain employees of railway companies commonly known as maintenance-of-way employees who perform work upon the right of way lines and tracks of railway companies (R. 11). Respondent has a contractual arrangement with the Texas and New Orleans Railroad Company under which it is permitted to operate a car on the rails of the railroad company for the serving of meals to such of the company's right of way employees as desire to avail themselves of the service. While many of the maintenance of way employees board in respondent's cars others do not (R. 12). In addition respondent's meal service is available to other railroad employees (R. 12) as well as to other persons who are not employees of the railroad and who may desire such service (R. 15). In addition to furnishing meals to some of the maintenance-of-way employees of the railroad, respondent rents bedding to such employees as desire and pay for it

(R. 12). Petitioner worked as a cook employed in one of respondent's cars and his only duties were to cook and serve meals in the dining car and keep the kitchen and car clean and suitable for the serving of meals and to keep an account of the meals served (R. 13). Respondent worked exclusively at points within the State of Texas (R. 13).

There is no generally accepted practice in the railroad industry in the United States with respect to the furnishing of meals to maintenance-of-way employees. On some railroads the maintenance-of-way employees are left entirely to their own devices for the procuring of meals and on the other extreme some railroads themselves furnish meal service to such employees. In other cases, as here, the railroad permits outsiders to come on its property for the purpose of serving meals to the maintenance-of-way employees (R. 14).

Both the District Court and the Circuit Court of Appeals found that petitioner was not engaged "in commerce" within the meaning of the Fair Labor Standards Act and therefore found it unnecessary to pass upon whether petitioner was employed in a service establishment within the meaning of Section 13 (a) (2) (R. 17-22, 31-34).

Argument

Petitioner asserts that this case is ruled by the recent decisions of the Court in OVERSTREET v. NORTH SHORE CORP., No. 284, October Term, 1942, and PEDERSEN v. FITZGERALD CONSTRUCTION CO., No. 396, October Term, 1942. In the OVERSTREET case this Court held that operating and maintenance employees of an interstate toll road company were engaged "in commerce" within the meaning of the Act and in the PEDERSEN case the Court held that employees of an independent contractor doing construction and maintenance work on an interstate railroad were engaged "in commerce" within the meaning of the Act. Although none of the em-

ployees in these cases was directly engaged in interstate transportation, it was the view of the Court that the work performed by them was so closely connected therewith as to justify treating them as if they were directly engaged therein. In this case, in order to hold that petitioner was engaged "in commerce," the Court must take an additional step away from any direct participation in that commerce since admittedly petitioner had no direct connection with the repair or maintenance of the railroad but only furnished a service to some, but not all, of those who did. His work was done wholly within the State of Texas—he cooked and served meals, did the necessary washing and cleaning in connection therewith, and looked after the bedding which was rented by some of the railroad employees from respondent. He did not work on any subject of interstate commerce nor on any instrumentality of such commerce. The most that can be said is that he performed personal services for individuals who were engaged in working on an instrumentality of interstate commerce. Petitioner urges that he must be treated as being engaged "in commerce" because his work is essential to the carrying on of that commerce. The argument runs something like this: (1) Railroad tracks are essential for the carrying of goods by railroad in interstate commerce; (2) it is essential that the tracks be kept in repair which requires the services of maintenance employees so that they likewise become essential to the carrying on of interstate commerce and are properly held to be engaged therein; (3) food is essential to the essential men who maintain the essential tracks and since a cook is essential to the preparation of the essential food the cook becomes essential to carrying on interstate commerce and is therefore to be regarded as himself a part of interstate commerce; (4) the Court has taken step No. 2 in the OVERSTREET and PEDERSEN cases and therefore it should take step No. 3 in this case. Apart from the fact that this type of argument could be used to bring the entire

range of human activities within the coverage of the Act, which admittedly was not intended by Congress, it is contrary to the stipulated facts. While it is true that petitioner did follow a crew of maintenance-of-way workers, it cannot properly be said that his activities were either necessary or essential to the maintenance-of-way workers in the performance of their duties. If petitioner's duties were essential to the carrying on of the work of the maintenance-of-way employees then all of such employees would necessarily have had to avail themselves of such services. It is stipulated, however, that some of these employees did not use the service at all, apparently preferring to get their food elsewhere. It is further stipulated that on some railroads all of the maintenance-of-way employees are left to their own devices for getting food whereas if services such as are offered by respondent were necessary or essential to the conduct of maintenance-of-way operations all railroads would necessarily have to furnish such services in one way or another. Evidently some of the maintenance-of-way employees felt that respondent's service was useful and desirable else they would not have used it, but it is equally evident that such services were not necessary or essential since some of the maintenance-of-way employees rejected it but still managed to carry on their work. What petitioner's argument overlooks is that while it is necessary and essential that maintenance-of-way employees be fed it is by no means necessary or essential that they be fed by respondent or petitioner, its employee. So far as concerns his relation to interstate "commerce" or "transportation" petitioner is in no different situation from the operators of the restaurants and hamburger stands which are to be found at the entrance of practically every big railroad yard or shop in the country.

Not only are petitioner's activities beyond the letter of the Act—they are entirely outside its stated purpose and intent.

This Court in UNITED STATES v. DARBY, 312 U.S. 100, 115 (1941), said:

> "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce shall not be made the instrument of competition in the distribution of goods produced under sub-standard labor conditions, which competition is injurious to the commerce and to the state from and to which the commerce flows."

The wages and hours of petitioner cannot in anywise affect the situation with which Congress sought to deal in the Fair Labor Standards Act. Respondent is not itself engaged in "commerce or in the production of goods for commerce" nor does it form any part of any industry engaged therein either directly or indirectly. While the wages paid to and hours worked by petitioner may very well have affected the cost of the meals served by respondent, the cost of these meals did not in any way affect the cost of any article moving, or intended to move, in interstate commerce nor does the cost of the meals in any way affect the wages or hours of the consumers of the meals who may themselves be engaged in commerce. The railroad whose employees are served pays respondent nothing and respondent's only relation to the railroad is that it has a contractual right, granted by the railroad, permitting it to come on railroad premises to furnish meals to such of the railroad employees as desire to purchase them. So far as concerns the evils which Congress sought to correct by the Act, the wages and hours of petitioner are of no more effect than the wages and hours of any other cook in any other restaurant where railroad employees happen to eat.

In the OVERSTREET case the court intimated that court decisions dealing with the coverage of the Federal Employers Liability Act would be given persuasive, if not controlling,

effect in determining the coverage of the Fair Labor Standards Act. It is true, as the court said, that both acts are "* * * aimed at protecting commerce from injury through adjustment of the master-servant relationship * * *," but they deal with entirely different aspects of that relationship and the evils sought to be corrected by the enactment of the two laws were wholly different. Nothing is better settled than that the courts will, in delimiting the coverage of an act of Congress, give great, if not controlling, consideration to the evils intended to be corrected by the legislation. APEX HOSIERY CO. v. LEADER, 310 U.S. 469, 489 (1940). If effect is to be given to this well settled rule of statutory construction, then the danger of indiscriminately applying decisions under the Federal Employers Liability Act to cases arising under the Fair Labor Standards Act is manifest and the present case throws it into bold relief. To paraphrase a statement of the late MR. JUSTICE HOLMES, the decisions of courts, in matters of this kind, are but the pricking of points through which a line of demarcation between coverage and noncoverage may finally be drawn. Considerations of congressional purpose may quite properly cause the courts in considering the same set of facts, under different statutes, to prick the points at different places even though the naked words of the two statutes delimiting their coverage may be the same.[1] It is in the light of these considerations that the

[1] It may be observed here that the decisions of the courts dealing with the coverage of the Federal Employers Liability Act prior to the 1939 amendment are in a state of considerable confusion. See the cases collected in 10 A. L. R. 1184; 14 A. L. R. 732; 24 A. L. R. 634; 29 A. L. R. 1207; 49 A. L. R. 1339; 65 A. L. R. 613; 77 A. L. R. 1374; and 90 A. L. R. 846. See particularly the editorial comments in 10 A. L. R. and 77 A. L. R. While there is no conflict among the courts with reference to the central core of coverage, when you come to the outer fringes you find no single line marked by the decisions but a whole series of lines crossing and recrossing each other without apparent rhyme or reason. While there is considerable conflict even in the decisions of the Federal courts, there is even greater conflict in the decisions of state courts. Perhaps some of the

decision in PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD CO. v. SMITH, 250 U.S. 101 (1919), should be viewed. Smith was an employee of the railroad company and was a member of a gang of bridge carpenters. He ran what was called a "camp car," furnished and moved by the railroad, in which all members of the gang, including Smith, ate, slept, and lived. Smith was injured when a locomotive ran into the camp car while it was standing on a siding and at a time when Smith was preparing a meal for himself and the other members of the gang. These facts, together with the fact that Smith was subjected to the same risks of injury as the other members of his gang, led the court to hold that he was employed in interstate commerce within the meaning of the Federal Employers Liability Act. Stated in another way, the court held that Smith fell within the class of those intended to be protected by Congress in the enactment of the Federal Employers Liability Act. Apart from the questionable authority of this case, which will hereafter be discussed, it is submitted that it is distinguishable from the present case in the following respects: (1) In the SMITH case the employee was at least arguably within the class sought to be protected by Congress whereas petitioner here is clearly not. (2) The relationship between Smith and the track workers was much closer than that between petitioner and the track workers here. (3) Smith was an employee of the railroad and a member of the track workers gang. Petitioner was not a member of the track workers gang and had no relation to the railroad. (4) The car in which Smith worked was the home of himself and the other members of the gang where they ate, slept, and lived. Petitioner merely prepared and served

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conflict is in the decisions of the state courts, at least, may be explained by considerations of social policy flowing from the great variety of state laws applicable to railroad employees under some of which the employer would be better off under the state act and under others he would be better off under the Federal act.

meals in his car and rented bedding for use elsewhere. (5) All members of Smith's gang ate, slept, and lived in the camp car, thus indicating it was a necessary part of their work. In this case some members of the railroad maintenance gang ate the meals prepared and served by petitioner while others ate elsewhere, indicating a far less integral connection between petitioner's service and that of the maintenance workers than the connection reflected in Smith's case.

The SMITH case, at the time it was decided, was recognized as a distinct extension of the previously recognized coverage of the Act. 6 Va. L. R. 66 (1919). Prior to the court's decision in the OVERSTREET case it had stood on the books for twenty-three years without being once cited by this Court although in one opinion it was listed in a footnote along with other cases as having been considered by a lower court whose decision was reversed. INDUSTRIAL COMMISSION v. DAVIS, 259 U.S. 182, 184 (1922). The opinion in the SMITH case was handed down during a period when the coverage of the Federal Employers Liability Act was being extended beyond what this Court later found to be proper limits. In the earlier cases interpreting the Federal Employers Liability Act it was given rather a restricted application [e.g., SHANKS v. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., 239 U.S. 556 (1916)] but gradually a looser interpretation came to be given to the Act until a series of cases decided at the October Term, 1931, called attention to the fact that the coverage of an employee by the Act was to be tested by his relation to interstate "transportation" and not interstate "commerce." CHICAGO & NORTHWESTERN RAILWAY CO. v. BOLLE, 284 U.S. 74 (1931); CHICAGO & EASTERN ILLINOIS RAILROAD CO. v. INDUSTRIAL COMMISSION, 284 U.S. 296 (1932); NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. v. BEZUE, 284 U.S. 415 (1932). In the BOLLE case the

unanimous court expressly condemned the use of the test of the employee's relation to interstate "commerce" (which was the sole test used in the SMITH case) and in the case of CHICAGO & EASTERN ILLINOIS RAILROAD CO. v. INDUSTRIAL COMMISSION the court overruled ERIE RAILROAD CO. v. COLLINS, 253 U.S. 77, and ERIE RAILROAD CO. v. SZARY, 253 U.S. 86, decided in 1920 and relied upon by respondent in that case. The COLLINS and SZARY cases were decided within a year of the SMITH case and both of them, as did the SMITH case, adopted the test of the employee's relation to "commerce" instead of to "transportation." In CHICAGO & EASTERN ILLINOIS RAILROAD CO. v. INDUSTRIAL COMMISSION the employee involved was engaged in hoisting coal into a chute to be taken therefrom by locomotive engines principally employed in the movement of interstate freight. The court held that this employee was not within the coverage of the Federal Employers Liability Act and this holding, it is submitted, cannot be reconciled with the earlier holding in the SMITH case. An engine pulling freight cars in interstate commerce is a direct instrumentality of interstate transportation and an employee who prepares the fuel to be consumed by such locomotive is obviously more directly connected with interstate transportation than is an employee who prepares fuel for the bodies of men who are not themselves instrumentalities of interstate commerce although they expend energy in working on such instrumentalities. Since the two decisions cannot be reconciled, the SMITH decision must be taken to have been overruled by the later decision.

Neither the letter nor the spirit of the Fair Labor Standards Act nor any decision of this Court requires a holding that petitioner comes within its coverage. The decisions below were correct and are not in need of further review by this Court.

II.

In this Court petitioner asserts for the first time that respondent may not claim exemption under Section 13(a)(2) of the Act because not specifically referred to in its pleadings. The "service establishment" issue was clearly raised by the facts introduced in evidence (R. 11-16), was fully briefed and argued by both petitioner and respondent in the trial court and in the Circuit Court of Appeals, and was considered by both courts although a decision of the question was not required because of the holding that petitioner was not engaged in "commerce" within the meaning of the Act. The trial court stated that:

> "Plaintiff affirms and Defendants deny that the facts bring them within the scope of Sections 6 and 7 of the Act. Defendants say, however, that if they do, they are exempt under Section 13 of the Act. This, Plaintiff denies" (R. 17).

The Circuit Court of Appeals stated that:

> "Our view of the case makes it unnecessary to express an opinion on the persuasive contention that under any view of the case appellee was a retail service establishment doing a wholly intrastate servicing business, and therefore within the exemption contained in Section 13(a)(2) of the Act" (R. 34)

This contention of petitioner is wholly without merit apart from the question of the necessity of specifically pleading Section 13(a)(2). Rule 15(b) of the FEDERAL RULES OF CIVIL PROCEDURE provides that:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

See also LIENTZ v. WHEELER, 113 F. (2d) 767 (C.C.A., 8th, 1940); LOW v. DAVIDSON MANUFACTURING CO., 113 F. (2d) 364 (C.C.A., 7th, 1940); MARTIN v. CHANDIS SECURITIES CO., ET AL., 128 F. (2d) 731 (C.C.A., 9th, 1942).

While it is not believed that there is any reasonable basis either in the letter or spirit of the Act for holding that petitioner is covered by the Act at all, it is nevertheless submitted that if the Act be held to apply to him then his work falls clearly within Section 13 (a) (2) of the Act exempting any "employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." It was stipulated that all of respondent's servicing was performed within the State of Texas so that the only question is whether petitioner's work was in a "service establishment." It is believed that respondent's business of feeding individuals is the very archetype of a "service establishment." Respondent, according to the stipulation, furnishes meal "service" and it is petitioner's duty to cook and "serve" meals and to keep the premises suitable for the "serving" of meals. You cannot, indeed, describe respondent's business or the work performed by petitioner without using the words "serve," "service," or some form thereof. The Wage-Hour Administrator himself in the latest revision of Interpretative Bulletin No. 6, par. 24, says:

> "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption, are: restaurants; cafeterias; roadside diners; hotels; tourist houses; trailer camps; * * * ."

On the face of it, therefore, it would seem that respondent's business clearly falls within the general description of a "service establishment" adopted by the Administrator himself. Despite this fact the Administrator's position with respect to the specific type of establishment here involved has been a changing one. In an Opinion Letter dated Sept. 16, 1940, it

was ruled that cooks assigned to railroad construction crews were exempt as being employed in a "service ~~department~~ establishment" although the cooks were employees of an interstate railroad and the meals were furnished to the men at the expense of the railroad company. A similar ruling was made in an Opinion Letter dated March 10, 1941, relative to employees serving meals in a mobile outfit owned and operated by a telegraph company for the furnishing of meals to the telegraph company's employees engaged in repairing their interstate telegraph lines. In a revision of Interpretative Bulletin No. 6 made in June, 1941, the Administrator for the first time took the position that "employees working on a traveling commissary or camp car which goes along with the working construction crew on a railroad or telegraph right of way are not engaged in a retail or service establishment for the purposes of the exemption." This ruling is made in paragraph 40 of the amended bulletin and is made without any discussion of the reasons therefor other than to refer to the ruling contained in the same paragraph with respect to cook houses in lumber camps. The ruling with regard to these cook houses is made on the basis that they are in isolated localities and are operated by the lumber companies as adjuncts to the companies' principal business. According to the Administrator they are "as much a part of the principal business as the tool sheds" and that "failure to provide the facilities would make continued operations difficult." The ruling in Paragraph 40 is concerned solely with situations where the employer furnishes the meals and the holding is that the employer may not separate this part of his business from the principal business and treat it as a "retail or service establishment." The ruling is a limitation on the ruling contained in Paragraph 39 of the same Interpretative Bulletin to the effect that where a company operates a cafeteria in a separate building for the convenience of its employees but the em-

ployees pay cash for what they eat and others may purchase food in the establishment the employer is entitled to separate it from the rest of his business and treat it as a "service establishment."

A careful reading of Paragraphs 39 and 40 of Interpretative Bulletin No. 6 makes it perfectly clear that the ruling is based solely on the proposition that the eating facilities are operated by the employer as a part of its principal businesss and without which its principal business could scarcely be conducted. In short, the holding is based on the proposition that a meal house operated by the employer for his employees is not itself an "establishment" of any kind—service or otherwise—but is simply part and parcel of the employer's business of manufacturing lumber or some other commodity.

While it is believed that the original ruling of the Administrator, adhered to for over two years, is the correct one, no argument is made on that point since it is clear that respondent falls outside the second ruling above referred to. The furnishing of meals by respondent is not merely an adjunct to or a part of its principal business but *is* its business and its sole business. The only "establishment" which it has is the establishment in which petitioner worked and there is no need for a separation of the operations of a single employer since respondent is a separate and distinct organization and wholly independent of the railroad company.

While it is not believed that the interpretations of the Administrator relied on by petitioner are applicable to this case, it is submitted that even if they did purport to cover the instant situation they are of such nature as to demand no particular attention from this Court. The brief will not be lengthened by discussion of the many cases in which the courts have refused to follow the Administrator's rulings with respect to what is a "service establishment" since the Court is undoubtedly familiar with them. In this particular situation,

if the Administrator's ruling be held applicable to petitioner's work, the general rule with respect to the dignity attached to administrative rulings by the courts is inapplicable since the administrative interpretation has not been uniform. BURNETT v. CHICAGO PORTRAIT CO., 285 U.S. 1, 16 (1932).

The decision in WOMACK v. CONSOLIDATED TIMBER CO., 132 F. (2d) 101 (C.C.A., 9th, 1942), cited by petitioner, requires no separate consideration since it is based on the Administrator's ruling above discussed. In the WOMACK case the trial court also followed the Administrator's ruling but in the course of his opinion (43 F. S. 625, 630) he used the following language which is particularly applicable here:

> "There are several factors pertinent to each of these establishments. A cookhouse is a restaurant or roadside diner and, therefore, a typical service establishment. A service was rendered in a physically separate establishment where meals were sold at retail to, and the facilities of the establishment were placed at the disposal of, private individuals for direct consumption and use. Persons not in the employ of the defendant or companies under contract with defendant were served upon the same terms as persons so employed, except that the price was higher for the former. Employees of logging companies under contract with defendant were served. There was no requirement that defendant's employees patronize either cookhouse. Those employees who were served in the cookhouse were charged a price for the meals eaten, which in the aggregate sustained the establishment but was not above cost. These payments were deducted from the employees' wages.
>
> "Obviously, if either of these cookhouses were operated by an entirely independent concern, it would be designated as a restaurant and would fall in the class of a retail or service establishment. Such a restaurant would do the majority of its selling or servicing in interstate commerce, irrespective of the fact that meals were sold

> to the employees of one company only. This factor highlights a fundamental problem. The timber worker is a member of the public. As to meals, he is himself a consumer and purchases food at retail as any other member of the consuming public. This is true whether he is employed or unemployed. The fundamental characteristic of a restaurant is sale at retail to the ultimate consumer in intrastate commerce."

The court's description above quoted fits respondent's situation precisely. It was ready, able, and willing to serve anyone who desired to be served even though this particular petitioner had not had occasion to serve any outsider within the two years prior to the filing of the suit. There was no requirement that the employees of the railroad company eat with respondent but those who did were charged for what they received. The railroad employees themselves paid for the food they ate. In such circumstances, said the court, when the cookhouses [commissary cars] are operated by independent concerns they are unquestionably exempt as "service establishments" irrespective of any question of whether the employees are engaged in commerce, in the production of goods for commerce, or in any occupation necessary for the production of goods for commerce.

In summary it may be said that by all of the ordinary tests, including the general test set up by the Administrator himself, petitioner was working in a "service establishment" and the only point against his being so considered is a vacillating interpretation by the Administrator which on its face does not cover petitioner at all since the Administrator's interpretation did not even purport to apply to the employees of an independent operator. It is respectfully submitted that if petitioner came within the Act at all his work was exempt as being performed in a "service establishment" and the decisions below may be sustained on that ground.

Conclusion

Respondent is engaged in the business of furnishing meals to all who will take them and such service is in every case performed within the confines of a single state. Respondent's service, it is true, is in the greatest part rendered to employees of interstate common carriers but in this regard respondent is legally in no different situation from a restaurant owner whose restaurant happens to be located adjacent to large railroad yards with the result that practically all of his trade is from employees of railroads engaged in interstate commerce. Respondent's activities and the wages and hours of its employees in no wise can affect the price of goods moving in interstate commerce or have any effect, direct or indirect, upon the evils which Congress sought to correct by the enactment of the statute. Neither the letter nor the spirit of the Act shows any intent on the part of Congress to cover the work performed by petitioner and even if it did the congressional exemption of employees employed in "service establishments" would clearly apply to petitioner.

The petition for certiorari should be denied.

Respectfully submitted,

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